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No. 05-1159

FILED

MAY 12 2006

OFFICE OF THE CLERK
SUPREME COURT

IN THE

Supreme Court of the United States

MIKE HATCH,
Attorney General of Minnesota,

Petitioner,

v.

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

HELGI C. WALKER
Counsel of Record
MEGAN L. BROWN
WILEY REIN & FIELDING LLP
1776 K STREET, N.W.
WASHINGTON, DC 20006
(202) 719-7000

Counsel for Cellco Partnership, Verizon Wireless LLC, and Duluth MSA Limited Partnership

(Additional Counsel Listed On Inside Cover)

May 12, 2006

201159

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

SEAMUS C. DUFFY
CHRISTOPHER M. ARFAA
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for Cingular Wireless PCS, successor to AT&T Wireless Services of Minnesota, Inc.

MARK J. AYOTTE
ANDREW M. CARLSON
BRIGGS & MORGAN, P.A.
2200 IDS Center
80 S. Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Counsel for Midwest Wireless Holdings L.L.C., Midwest Wireless Communications L.L.C., American Cellular Corporation, and Rural Cellular Corporation d/b/a Unicel

CHRISTOPHER J. WRIGHT
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1325

Counsel for Sprint Spectrum L.P.

ROBERT D. KAPLAN
DANIEL B. RAPPORT
FRIEDMAN, KAPLAN, SEILER
& ADELMAN LLP
1633 Broadway
New York, NY 10019
(212) 833-1100

Counsel for VoiceStream Minneapolis, Inc. and T-Mobile USA, Inc.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly held that Section 332 of the Communications Act, which prohibits any state action "to regulate . . . the rates charged by any commercial mobile service," 47 U.S.C. § 332(c)(3)(A), expressly preempts the provision of a Minnesota statute that: (i) creates a 60-day waiting period for increases in wireless rates, thus freezing rates for at least that period of time; and (ii) enacts an approval mechanism for rate increases that also fixes rates for the entire term of at least some existing wireless service agreements.

2. Whether the Eighth Circuit correctly held that the preempted provision was not severable, under Minnesota law, from the remainder of the challenged statute.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29, the Respondents provide the following corporate disclosures:

1. Cellco Partnership d/b/a Verizon Wireless ("Cellco" or "Verizon Wireless" or "VZW") is a Delaware general partnership with debt in the hands of the public. Cellco has seven partners in total. Five of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Cellular Holdings, L.P.; NYNEX PCS Inc.; PCSCO Partnership; GTE Wireless Incorporated; and GTE Wireless of Ohio Incorporated (collectively, the "Verizon Partners"). None of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). None of the Vodafone partners is publicly held.

2. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

3. Verizon Wireless (VAW) LLC d/b/a Verizon Wireless ("Verizon Wireless VAW") is a Delaware limited liability company whose sole member is Cellco. Verizon VAW is not publicly held.

4. Duluth MSA Limited Partnership d/b/a Verizon Wireless ("Verizon Wireless Duluth") is a Delaware limited partnership. Its general partner is AirTouch Minnesota, LLC

("AirTouch Minnesota"), a Delaware limited liability company whose sole member is Cellco. Air Touch Minnesota also holds a limited partner interest in Verizon Wireless Duluth. Air Touch Minnesota's limited partner is Chequamegon Cellular, Inc., a Colorado corporation whose sole shareholder is Cellular Inc. Network Corporation. Cellular Inc. Network Corporation is a Colorado corporation whose sole shareholder is CommNet Cellular Inc. CommNet Cellular Inc. is a Colorado corporation whose sole shareholder is Cellco. Neither Verizon Wireless Duluth, AirTouch Minnesota LLC, Chequamegon Cellular, Inc., Cellular Inc. Network Corporation, nor CommNet Cellular Inc. is publicly held.

5. Midwest Wireless Holdings, L.L.C. and Midwest Wireless Communications, L.L.C. (collectively "Midwest Wireless") have no parent company, and are privately held limited liability companies. There is no publicly held company that owns 10% or more of their stock.

6. American Cellular Corporation ("ACC") is a subsidiary corporation of Dobson Communications Corporation ("Dobson"). Dobson is a publicly held corporation that owns more than 10% of ACC's stock. Other than Dobson, there is no publicly held corporation that owns 10% or more of ACC's stock.

7. Rural Cellular Corporation d/b/a Unicel ("RCC") has no parent company and is a publicly traded company. There is no publicly held corporation that owns 10% or more of RCC's stock.

8. Sprint Spectrum L.P., a Delaware limited partnership, consists of: (1) general partner Sprint Spectrum Holding Company L.P., a Delaware limited partnership; and (2) limited partner MinorCo., L.P., a Delaware limited partnership.

9. WirelessCo, L.P., a Delaware limited partnership, consists of: (1) general partner Sprint Spectrum L.P.; and (2) limited partner MinorCo, L.P.

10. The principal place of business for Sprint Spectrum, L.P., WirelessCo, L.P., Sprint Spectrum Holding Company L.P., and MinorCo, L.P. ("the Sprint Partnerships") is Reston, Virginia. None of the Sprint Partnerships is publicly traded. All of the Sprint Partnerships are indirectly owned by Sprint Nextel Corporation. Sprint Nextel Corporation's stock is publicly traded under the symbol S.

11. AT&T Wireless Services of Minnesota, Inc. was merged into New Cingular Wireless PCS, LLC on December 31, 2004. New Cingular Wireless PCS, LLC is wholly owned by Cingular Wireless LLC and Cingular Wireless LLC's wholly-owned subsidiaries. Cingular Wireless LLC is wholly owned by AT&T Inc. and BellSouth Corporation and their wholly-owned subsidiaries. AT&T Inc. and BellSouth Corporation are both publicly-traded companies that own, either directly or through wholly-owned subsidiaries, more than 10% of New Cingular Wireless PCS, LLC and Cingular Wireless LLC. No other publicly-traded company owns an interest in New Cingular Wireless PCS, LLC or Cingular Wireless LLC. AT&T Inc. and BellSouth Corporation have no corporate parents, and no publicly-traded company owns 10% or more of either company.

12. The parent company of VoiceStream Minneapolis, Inc., is VoiceStream Central Operating Company, Inc. VoiceStream Central Operating Company is not a publicly held corporation. An indirect parent company of VoiceStream Minneapolis Inc., is T-Mobile USA, Inc.

13. The parent company of T-Mobile USA, Inc. is T-Mobile Global Holding, GmbH. An indirect parent of T-Mobile USA, Inc., is Deutsche Telekom AG, which is a publicly held corporation.

14. Other than the indirect parent relationship of Deutsche Telekom AG as herein described, there is no publicly held corporation that owns 10% or more of either VoiceStream Minneapolis, Inc., or T-Mobile USA, Inc.

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INTRODUCTION AND SUMMARY OF REASONS TO DENY THE PETITION

Petitioner asks this Court to grant certiorari in order to review what he himself describes as a novel question, and as to which he alleges no conflict of authority whatsoever. No conflict is alleged because there is none. Indeed, it is clear from the petition for certiorari itself that the application of 47 U.S.C. § 332(c)(3)(A) ("Section 332(c)(3)(A)" or "Section 332") to state "consumer protection" laws aimed at wireless service providers, such as Minn. Stat. § 325F.695 (2004) (codifying 2004 Minn. Laws ch. 261, art. 5) ("Article 5"), is a matter that is now beginning to percolate in the state and federal legal systems.

Petitioner's assertion that the Eighth Circuit's decision could be interpreted to strip the States of all ability to police any unfair business practices in the wireless industry, and that this case thus qualifies as one of exceptional national importance, is fundamentally flawed. *First*, the assertion misapprehends the actual holding of the Court of Appeals with respect to Section 332(c)(3)(A). Far from "overly expansive," Pet. 8, the Eighth Circuit's reading of the statutory ban on "any" state action "to regulate . . . the rates charged" by wireless service providers – namely, that it precludes state action to "freeze" or "fix" retail rates – is well within the core of the statutory language and purpose and administrative precedent interpreting Section 332(c)(3)(A). *Second*, the claim is based on nothing more than speculation as to the future effect of the Eighth Circuit's decision. *Third*, the argument is premised on a persistent mischaracterization of the wireless industry's practices and ignores the many remedies for consumers and States left untouched by the Eighth Circuit's invalidation of Article 5. At bottom, then, Petitioner seeks only the correction of alleged errors below.

Even if this Court were to find that the Eighth Circuit's decision is worthy of review, this case suffers from fatal vehicular flaws. *First*, Article 5 is set to expire on August 1, 2007. *Second*, members of the Minnesota Legislature have introduced legislation to amend Article 5, in part in an attempt to cure the statute's various legal defects. There is no point in this Court reviewing the decision of the Court of Appeals with respect to a state statute that will shortly cease to exist and may also be superseded. If the Court were to grant certiorari and Article 5 expired (or was modified) before this Court could render its judgment, the controversy would be mooted. *Finally*, any decision by this Court reversing the judgment below may not ultimately determine the outcome of this case. Respondents based their arguments for preliminary relief in the Eighth Circuit not just on express preemption under Section 332 but also on other preemption grounds (conflict and implied preemption) and the unconstitutionally vague nature of Article 5; Respondents brought additional claims in the District Court that would also be viable for adjudication on any remand.

In any event, there is no error in any of the Court of Appeals' analysis. The Eighth Circuit correctly determined that Section 332's ban on rate regulation covers state action that fixes the rates of wireless service providers, as noted above. The Eighth Circuit then properly applied that rule of federal law to the specific piece of state legislation at issue here, finding that subdivision 3 of Article 5 unlawfully fixes wireless rates in several ways. Specifically, the Court found that: (i) the statute's 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) the approval mechanism requiring customers to "opt in" to rate increases fixes rates, for those customers who decline to opt in, for the entire term of their existing wireless service agreements; and (iii) even with respect to customers who might agree to a price increase, their rates would be frozen until that assent was manifested. While Petitioner here contests the correctness of the first finding

described above, he does not even address the two alternative conclusions of the Court of Appeals, which are themselves adequate and independent grounds to sustain a finding of preemption. Last, the Court of Appeals rightly concluded that Minnesota law did not permit the severance of the remaining provisions of Article 5 from the preempted provision.

In sum, this case involves the application of a federal statute – the Eighth Circuit's interpretation of which comports with all existing precedent, including that of the expert agency charged with its implementation – to a particular state statute that is scheduled to expire in 2007 and may also be substantially modified. The Court of Appeals provided multiple grounds for its determination that subdivision 3 regulates rates, only one of which Petitioner challenges. Moreover, to the extent the case presents larger questions about the validity of state wireless consumer protection laws under Section 332, those questions are at this point in time starting to wind their way through the federal administrative process and the state and lower federal courts. This is not the stuff of certiorari. The petition should be denied.

STATEMENT OF THE CASE

A. Legal and Factual Background

1. Section 332(c)(3)(A) Establishes Exclusive Federal Jurisdiction over Wireless Rates.

Due to the inherently interstate nature of radio-based communications, wireless communications services have long been regulated at the federal level. *See Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) (explaining that, because "[n]o state lines divide the radio waves, . . . national regulation is . . . essential to the efficient use of radio facilities"). At their inception in the early 1980s, however, modern wireless communications common carrier services, such as cellular telephone service, were subject to the same system of dual state and federal regulation that applied to

traditional wireline telephone services. *See* 47 U.S.C. § 152; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

In order to speed the development of competition in the wireless industry, Congress amended the Communications Act in 1993 to "dramatically revise the regulation of the wireless telecommunications industry" with respect to rates. *Conn. Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996). These sweeping changes had two principal components. *First*, in Section 332, Congress expressly prohibited "*any*" state or local regulation of the "rates charged by" wireless phone carriers. 47 U.S.C. § 332(c)(3)(A) (emphasis added). Congress specified in Section 332 that the statute does not operate to preempt state or local authority to regulate the "*other* terms and conditions" of wireless service. *Id.* (emphasis added). *Second*, Congress amended the Communications Act to *exclude* wireless phone services from the general prohibition on regulation of *intrastate* telecommunications services, thereby exempting wireless services from the system of dual state and federal regulations that governs traditional wireline telephone services. *Id.* § 152(b). By these changes, Congress intended "to establish a national regulatory policy for [wireless telephone service], not a policy that is balkanized state-by-state." *Petition of California and California Public Utilities Commission*, 10 FCC Rcd. 7486, 7499 (¶ 24) (1995) (emphasis and footnote omitted).

As a result of this Congressional policy choice, the wireless industry has become vigorously competitive and nationally ubiquitous. This competition has yielded tremendous benefits for consumers, such as increased choices among service providers and rate plans, as well as consistently declining prices. *See Tenth Annual CMRS Competition Report*, WT Dkt. No. 05-71, FCC 05-173, at 76-77 (¶ 204) (Sept. 30, 2005) ("*2005 Competition Report*") ("U.S. consumers continue to benefit from robust competition in the CMRS marketplace."); *id.* at 4-5

(¶ 4) ("Consumers continue to pressure carriers to compete on price and other terms and conditions of service . . . ."). Highly popular with consumers are national "one-rate" calling plans, which are offered on a uniform basis across the country. *See id.* at 38-39 (¶ 97) ("Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long-distance charges.").

Contrary to Petitioner's suggestions, customer satisfaction in the wireless industry is high and continually improving. According to the most recent report by the Federal Communications Commission ("FCC" or "Commission"), the percent of wireless subscribers who complained about their service in the fourth quarter of 2005 was 0.0024%, or 24 subscribers per million. *See* Press Release, CTIA, Largent Hails 28% Drop in Wireless Complaints (Feb. 17, 2006), *available at* http://www.ctia.org/news_media/press body.cfm?record_id =1582 (citing News Release, FCC, Quarterly Report on Informal Consumer Inquiries and Complaints Released (Feb. 16, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/ DOC-263829A1. pdf ("FCC Consumer Report")). Consumer complaints about wireless service fell by 28% between the third and fourth quarters of 2005. *See FCC Consumer Report* ("Wireless complaints decreased from 6,873 in the 3rd quarter to 4,956 in the 4th quarter.").

2. Minnesota Seeks Unlawfully to Regulate Rates Under the Guise of "Consumer Protection."

Against this backdrop of deregulation and burgeoning competition, the Minnesota Legislature enacted a statute that explicitly targets wireless rates and rate structures. Article 5 was signed by the Governor on May 29, 2004.

Respondents provide wireless telecommunications service to subscribers in Minnesota and throughout the United States pursuant to standardized customer service agreements. These agreements typically include provisions that address future changes in terms. They permit carriers to modify prices and other contract terms upon written, advance notice to subscribers. In the case of materially adverse modifications, the subscriber has the right to reject the change and cancel the contract without any early termination fee. The service agreements thus protect subscribers from materially adverse modifications while at the same time providing wireless carriers flexibility to change rates when necessary, allowing them to cover changes in their cost structure and to respond to other market factors.[1]

Article 5 overrides the rate flexibility contained in these contracts and severely constrains wireless carriers' ability to make "substantive changes" to their customers' wireless service contracts pursuant to the change-in-terms provisions contained in those contracts. Subdivision 1 of Article 5 defines the restricted "substantive changes," making clear that the object of the statute is to regulate wireless rates and rate structures:

> Subd. 1(d). "Substantive change" means a modification to, or addition or deletion of, a term or

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1. For example, Verizon Wireless uses a standard contract that provides customers the right to advance notice of contract changes and gives customers 60 days from receipt of the first bill including such changes to terminate their service, free of penalty, if the change would have a material adverse effect on the customer. *See* Verizon Customer Agreement, *available at* http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (last visited May 11, 2006). In addition, the Consumer Code for Wireless Service, to which all Respondents voluntarily adhere, gives consumers the right to terminate service, without any early termination fee, in response to a material change in contract terms. *See* CTIA Consumer Code for Wireless Service, *available at* http://files.ctia.org/pdf/The_Code.pdf (last visited May 8, 2006).

> condition in a contract that *could result in an increase in the charge to the customer* under that contract or that *could result in an extension of the term* of that contract.

Art. 5, § 1, subdiv. 1(d) (emphases added). Subdivisions 3 and 4 of Article 5 then prescribe the narrow circumstances in which a wireless carrier may make a "substantive change" – that is, alter its rates pursuant to the change-in-terms provision contained in standard wireless service agreements – either at its own initiative or in response to requests for changes by subscribers, respectively.

In particular, subdivision 3 governs "Provider-initiated substantive change[s]" and states that wireless carriers

> must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer *60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization* which is recorded by the provider and maintained for the duration of the contract period. *If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.*

Id., subdiv. 3 (emphases added). By prohibiting any rate increase absent affirmative customer opt-in, Article 5 effectively freezes rates in contravention of federal law.

B. Proceedings Below

On June 16, 2004, two weeks before Article 5 was scheduled to take effect, Respondents filed suit in the United States District Court for the District of Minnesota seeking a declaratory judgment that Article 5 is invalid under Section 332 and

numerous provisions of the U.S. Constitution. On the grounds that Article 5 was expressly preempted by Section 332, invalid under principles of conflict and implied preemption, and that it was unconstitutionally vague, Respondents requested both preliminary and permanent injunctive relief to prevent the Attorney General of Minnesota from enforcing Article 5.

On June 29, 2004, the District Court entered a Temporary Restraining Order ("TRO") preventing enforcement of Article 5. Pet. App. 33a-44a. On September 3, 2004, the District Court substantially reversed itself, finding that the carriers were not likely to succeed on their claim of preemption under Section 332. Pet. App. 16a-32a. The District Court thus entered an order dissolving the TRO and issued a limited preliminary injunction barring enforcement of the statute only to the extent that its 60-day notice and opt-in requirements directly interfered with wireless providers' ability to recover regulatory and other fees authorized by federal law.

The carriers immediately appealed the denial of the preliminary injunction to the Eighth Circuit. On October 14, 2004, the Court of Appeals entered a stay pending appeal of the District Court's order.[2] In the Eighth Circuit, the FCC filed an amicus brief in support of the wireless carriers, setting forth its view that "Article 5 imposes a 60-day freeze on the implementation of virtually all rate increases" and that the imposition of such limits as to "when and under what conditions a carrier may raise its prices . . . is impermissible under section 332(c)(3)(A)." Amicus Curiae Br. of the FCC at 18, 21, *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2004) (No. 04-3198).

On December 9, 2005, the Eighth Circuit reversed the decision of the District Court. Pet. App. 3a. The Court of Appeals

2. The District Court stayed its order only until October 15, 2004, or such time as the Court of Appeals acted to stay the order pending appeal, whichever came first. *Cellco P'ship v. Hatch*, No. 04-2981 (D. Minn. Sept. 10, 2004) (Tunheim, J.) (order granting stay pending appeal).

held that Article 5 is expressly preempted by Section 332. The Court began its analysis with the text of Section 332(c)(3)(A), inquiring "whether [Article 5] regulates 'rates charged' by providers." Pet. App. 5a. The Court considered the purpose, legislative history, and prior administrative interpretations of the federal statute. Pet. App. 5a-9a. It explained that the FCC, the expert agency charged with implementation of the Communications Act, has read Section 332(c)(3)(A) to prohibit: (i) state schemes requiring prior approval of new rates and delaying implementation of those rates; (ii) not just regulation of rates but also rate structures and rate elements; and (iii) claims under generally applicable state consumer protection, tort, or contract laws when those claims go to the reasonableness of rates. Pet. App. 6a-8a. The Court of Appeals "agree[d] with the FCC that 'fixing rates of . . . providers' is rate regulation." Pet. App. 9a (second alteration in original) (quoting *Petition of Pittencrief Communications, Inc.*, 13 FCC Rcd. 1735, 1745 (¶ 20) (1997)).

Article 5, the Court of Appeals found, "fixes" wireless rates in at least three ways. Pet. App. 9a & 10a. Specifically, the Court determined that: (i) the statute's 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) even accepting the State's argument that the 60-day period was not mandatory, the approval mechanism for rate increases requiring that customers opt in fixes rates for those customers who decline to opt in, for the entire term of their existing wireless service agreements; and (iii) even if some customers agreed to a price increase, contrary to all intuition, the rate would be frozen until that assent was manifested. Pet. App. 9a-10a. The Court concluded that a "waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to 'opt in,' has a clear and direct effect on rates." Pet. App. 12a.

The Court of Appeals rejected as "overbroad" and unpersuasive the State's attempt to recharacterize the statute as a consumer protection measure based on contract law. Pet. App. 10a-11a. The Court reasoned that "[t]o avoid subsuming the regulation of rates within the governance of 'terms and conditions,' the meaning of 'consumer protection' in this context must exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers." Pet. App. 11a. The Court also observed that the statute "goes beyond traditional requirements of contract law, . . . effectively void[ing] the terms of contracts currently used by providers in one industry, and substitut[ing] by statute a different contractual arrangement." Pet. App. 11a. For all these reasons, the Court held that "subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A)." Pet. App. 12a.

The Court of Appeals then applied settled Minnesota severance law, found that subdivision 3 could not be severed from the rest of Article 5, and thus declared Article 5 void in its entirety. Pet. App. 12a-15a.

Petitioner filed a Petition for Writ of Certiorari on March 9, 2006. Respondents respectfully submit this Opposition.

REASONS FOR DENYING THE PETITION

I. This Case Satisfies None of the Criteria for Review by This Court.

A. No Split of Authority Is Even Alleged on the Concededly Novel Issue Presented.

The Petition itself expressly states that "[t]his case presents *the first time* a court of appeals has examined whether a state [wireless "consumer protection"] statute . . . is preempted by 47 U.S.C. § 332(c)(3)(A)." Pet. 7 (emphasis added). As Section 332(c)(3)(A) makes clear, any state law that regulates rates, no matter the "consumer protection" label affixed to it, is preempted, and Article 5 is just such a law. *See infra* pp. 21-30.

Nonetheless, the interaction of Section 332(c)(3)(A) and state statutes that purport to protect consumers by interfering with carriers' rates and rates structures is, as Petitioner himself candidly explains, a developing area of telecommunications law. This is the first federal appellate court decision in this area of preemption, and it addressed the legality of the first state statute of its type in the country.

Because this is a matter of first impression in the courts of appeals, Petitioner does not – indeed, cannot – allege any conflict between the Eighth Circuit's decision and any opinion of this Court or *any other* court. The Eighth Circuit's interpretation of Section 332(c)(3)(A) itself is in the heartland of that statute's plain meaning and purpose and is based on a consistent set of FCC decisions interpreting that statute. The Eighth Circuit's interpretation of Section 332(c)(3)(A) does not conflict with the decision of any state or federal court. Nor is there any conflict between the Eighth Circuit's application of Section 332 to the particular kind of state action before it and the decision of any other court. In short, there is simply no split in authority whatsoever that would warrant this Court's review.

The full scope of the prohibition against state "regulat[ion]" of "the rates charged by" wireless service providers is an issue now developing in the lower federal courts and at the FCC. Presently pending in the Eleventh Circuit are two challenges to a Commission Order finding that state regulations that require or prohibit "line-items" on wireless bills are preempted under Section 332(c)(3)(A), thus presenting questions related to the breadth of the statutory phrase "rates charged." *See Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-11682-DD (11th Cir. filed Jan. 12, 2006) (petition for review of declaratory ruling portion of *Truth-in-Billing and Billing Format*, 20 FCC Rcd. 6448, 6458 (¶ 23) (2005)); *Vt. Pub. Serv. Bd. v. FCC*, No. 05-12601-DD (11th Cir. filed Jan. 12, 2006) (same)).

And, as the Court of Appeals observed, "the FCC is in the midst of a rulemaking" to define federal-state jurisdictional boundaries with respect to wireless billing practices generally. Pet. App. 7a n.2 (citing *Truth-in-Billing and Billing Format*, 20 FCC Rcd. at 6476 (¶ 53) (tentatively concluding that "states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices")). In addition, the Commission currently has before it two petitions for declaratory rulings that wireless early termination fees are "rates charged" within the meaning of the statute and that state class action suits challenging the reasonableness of those fees "regulate" rates. *See Petition of the CTIA for an Expedited Declaratory Ruling*, FCC Docket No. 05-194 (filed Mar. 15, 2005); *Petition of SunCom Operating Company LLC for Declaratory Ruling*, FCC Docket No. 05-193 (filed Feb. 22, 2005).

Indeed, Petitioner dwells at length on the allegedly similar wireless consumer protection statutes recently enacted in thirteen States, a number that Petitioner expects will grow as more States join in the effort to test the bounds of Section 332(c)(3)(A). *See* Pet. 16-18 & nn. 7-8.[3] This only proves, however, that it would be premature for this Court to take up these issues in this case.

The various proceedings described above, along with any that may arise in the future, will present varied factual and legal contexts to which Section 332(c)(3)(A) can be applied, and thus can be expected to contribute to an evolving understanding of the meaning and proper application of the statute. Thus, the larger questions regarding the full breadth of Section 332(c)(3)(A)'s preemptive scope are not appropriate for review in the instant controversy.

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3. Whether or not these state statutes implicate Section 332(c)(3)(A), they do not employ the 60-day notice and opt-in mechanisms to prevent rate increases contained in Article 5.

For these reasons, it is clear that the Petition presents no split in authority of any type, that it involves the first federal appellate court decision on the first state wireless "consumer protection" statute in the nation, and that the larger issue of the preemptive scope of Section 332(c)(3)(A) is now being actively considered at the FCC, in pending litigation, and possibly in the context of new state efforts to regulate wireless rates.

B. This Is Not a Case of Extraordinary National Importance.

In the absence of any alleged or actual conflict, Petitioner attempts to argue that this is a case of great significance not just to Minnesota but to all States and wireless customers nationwide, setting forth a parade of horribles that supposedly will flow from the Eighth Circuit's decision. *See* Pet. 9-12. This argument is entirely speculative and, in any case, without merit. In light of the holding of the Eighth Circuit – that Article 5 is preempted by Section 332(c)(3)(A) because it regulates wireless rates – it is plain that this case presents no issue of extraordinary national importance that would justify this Court's review.

First, the holding of the Eighth Circuit is far from "overly expansive." Pet. 8. To the contrary, the Court of Appeals' decision falls squarely within the inner core of the plain language, purpose, and relevant FCC interpretations of the statute. With respect to the meaning of Section 332(c)(3)(A), the Court of Appeals read the ban on "any" state authority "to regulate . . . the rates charged" by wireless service providers, 47 U.S.C. § 332(c)(3)(A), to cover state action that "fixes" or "freezes" rates. Pet. App. 9a-10a. This interpretation was grounded not only in the text of the statute, but also in FCC precedent construing the statute as preventing States from "'fixing rates of . . . providers,'" Pet. App. 9a (alteration in original) (quoting *Pittencrief*, 13 FCC Rcd. at 1745 (¶ 20)), and finding that prior state review of wireless rates occasioning delays of 30 days before the new rates could take effect was

prohibited rate regulation, *see* Pet. App. 7a (explaining *Petition of Hawaii Public Utility Commission*, 10 FCC Rcd. 7872, 7882 (¶ 46) (1995)). It was also based on the Court's consideration of the legislative history and purpose of Section 332. *See* Pet. App. 5a-9a.

If the ban on state rate regulation means anything, it encompasses state action that fixes or freezes rates. While there may be cases that test the outer boundaries of Section 332(c)(3)(A)'s scope, this is not one. With respect to the application of Section 332(c)(3)(A) to the state statute before it, the Court carefully examined subdivision 3 and determined that it operated, in *several* ways, to freeze rates by its 60-day notice period and opt-in mechanism for price increases. As far as Respondents are aware, no other state wireless "consumer protection" statute, and certainly none of those cited by Petitioner, Pet. 16-17 & nn. 7-8, bears these features.

Thus, Petitioner's assertion that the decision below "strips the states of their sovereign right to protect wireless consumers," Pet. 9, is simply incorrect.[4] The decision simply enforces, as applied to Article 5, Congress' command that States not engage in regulation of wireless rates.

Second, Petitioner's claims as to the nationwide effect of the Eighth Circuit's decision are purely conjectural. As an initial matter, the decision is of course binding only on the courts in that judicial circuit and, as noted above, Respondents are not aware of any state wireless statute that employs the procedural mechanisms found in Article 5. Neither Petitioner nor Respondents can predict how other circuits will analyze other state laws under Section 332(c)(3)(A) or how they will treat the Eighth Circuit's decision. Accordingly, there is no basis for

4. Petitioner's concern regarding the adequacy of notice to consumers of contractual changes, Pet. 11, is misplaced. Carriers already provide subscribers with advance notice of contractual modifications, as required by the contracts themselves and industry standards. *See supra* pp. 5-6 & n.1.

Petitioner's suggestion that the decision below somehow automatically deprives consumers and state officers nationwide of any rights they may have under existing law.

Third, the argument is founded on unfair and inaccurate assertions about the business practices of wireless carriers. Throughout his filing, Petitioner persists in the notion, soundly rejected below, that wireless carriers "unilaterally" change the terms of customer contracts. *See* Pet. 3-4, 12-13 & n.5. As we have explained, and as the Court of Appeals agreed, the contracts at issue expressly provide for advance notice to the subscriber of rate increases and allow the subscriber to reject the change, if it is a material adverse one, within a reasonable period of time without triggering any early termination fee. *See* Pet. App. 11a ("The existing contracts . . . permit the providers to effect rate increases upon reasonable notice to the customer, whose continued use of the service binds him to the new rate unless he affirmatively declines to accept the changes."); *see supra* pp. 5-6 & n.1. There is nothing "illusory" about these contracts. *See* Pet. App. 11a (noting that "opt-out" contracts "are generally accepted as legal and binding"). It is Minnesota that is trying to alter the terms of wireless contracts, not Respondents. *See* Pet. App. 11a ("This statute effectively *voids* the terms of contracts currently used by providers. . . ." (emphasis added)).

Despite Petitioner's implication that wireless carriers are bad actors in the marketplace, consumer satisfaction with wireless service is extraordinarily high and continually rising. Nationwide, wireless billing and rate complaints dropped 24% (from 3,259 to 2,480) between the third and fourth quarters of 2005, *see* FCC Consumer Report at 9 (providing data for fourth quarter); News Release, FCC, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 9 (Nov. 4, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262020A1.pdf (providing data for third

quarter), while over the same period the number of wireless subscribers increased by 6 million. *See* Letter from Christopher Guttman-McCabe, Vice-President, Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC, at 4 & n.11 (Mar. 13, 2006) (on file with FCC, CC Docket No. 98-170). Complaints as a percentage of subscribers are even more revealing. Billing complaints fell from 0.0016% to 0.0012%, an improvement of more than 26%; in fact, for the 4th quarter of 2005, wireless consumers had just 3 billing complaints per million subscribers per month. *Id.* at 4. The wireless sector is highly competitive, and carriers thus have every incentive to – and do – strive to provide their customers with the best possible prices and service.[5]

Petitioner's related allegation that the Eighth Circuit's decision leaves wireless subscribers without any "meaningful remedy," Pet. 20, is simply wrong. Wireless customers who feel they have been aggrieved by their carrier have multiple avenues of relief, all of which the Eighth Circuit's decision leaves intact. *First and foremost*, consumers can switch carriers. As competition in the wireless industry has exploded, so have the options for wireless users. Customers are free to choose between an ever-increasing number of wireless contracts and service plans provided by many different local, regional, and national wireless providers. *See 2005 Competition Report*, 4-5 (¶ 4) ("Consumers continue to pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service."). Consumer freedom to change carriers, and thereby to intensify competitive forces in the industry, has only been heightened by the FCC's recent implementation of number portability. *See Implementation of Section 6002(b) of the*

5. In any event, allegations of generalized consumer dissatisfaction are irrelevant to the legal questions presented here.

Omnibus Budget Reconciliation Act of 1993, 19 FCC Rcd. 20597, 20601 (¶ 4) (2004) ("[T]he implementation of local number portability ('LNP') beginning in November 2003 has lowered consumer switching costs by enabling wireless subscribers to keep their phone numbers when changing wireless providers."); *see also 2005 Competition Report*, 5 (¶ 4) ("LNP has put added pressure on carriers to improve service quality in order to retain existing customers. . . .").

Second, if any wireless carrier violates the terms of an existing contract, fails to disclose material terms, or engages in an unfair business practice, subscribers have recourse to traditional remedies under generally applicable state contract, tort, and consumer fraud laws (so long as those remedies do not involve an assessment of the reasonableness of rates). *See Wireless Consumers Alliance, Inc.*, 15 FCC Rcd. 17021, 17022 (¶ 2) (2000).

Third, wireless carriers' rates and rate structures, while off limits to state regulators, are subject to federal review under the "unjust or unreasonable" standard of 47 U.S.C. § 201(b) and the non-discrimination requirement of 47 U.S.C. § 202(a).[6] Wireless customers are protected by these laws as well as the FCC's accompanying complaint procedures, which provide for convenient reporting of complaints online, or by mail, telephone, or fax. *See* FCC, Filing A Complaint With The FCC Is Easy, http://www.fcc.gov/cgb/complaints.html (last visited May 9, 2006). The FCC also offers customers informal mediation and resolution of problems. *See* FCC, Consumer Inquiries & Complaints Division, http://www.fcc.gov/cgb/cgb_offices.html#CICD (last visited May 9, 2006).

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6. The FCC has previously found that wireless rates are presumptively reasonable and non-discriminatory because wireless carriers lack market power. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, 1419, 1478 (¶¶ 16-17, 173-75) (1994).

If Minnesota (or any other State) believes, despite the availability of these various remedies, that rate regulation of wireless services is necessary to protect its citizen-consumers, it can seek permission from the FCC to take such action. *See* 47 U.S.C. § 332(c)(3)(A) (providing that "a State may petition the Commission for authority to regulate the rates for any commercial mobile radio service" and Commission "shall grant such petition" upon the State's demonstration of certain factors, such as market failure). Notably, Minnesota has never done so.

For these reasons, it is clear that this is not a case of exceptional national importance that might warrant the exercise of this Court's certiorari jurisdiction notwithstanding the absence of any alleged or actual conflict.

II. Even if the Traditional Criteria for Granting Certiorari Were Satisfied, This Case Suffers from Fatal Vehicular Flaws.

A. The State Statute at Issue Will Soon Expire and Also May Be Superseded by Amending Legislation.

Even if Petitioner had satisfied any of the traditional factors for granting certiorari, this case is a fatally flawed vehicle for any meaningful judicial review. Not only is the ultimate resolution of this case dependent on the meaning of Article 5, it is undisputed that this statute, which rests at the heart of the dispute here, is scheduled to *expire* next year. Art. 5, § 1, subdiv. 5 ("This section expires August 1, 2007."). Thus, any relief provided by this Court would be at best short-lived, as the very statute whose invalidation is challenged here will cease to exist within months of any decision rendered by this Court. And if the statute expires before the Court can issue an opinion, that would moot the case entirely. *See, e.g., Burke v. Barnes*, 479 U.S. 361, 363 (1987) (holding, in context of "challenge to the validity of a statute that has expired," that "any issues . . . were

mooted when that bill expired by its own terms"). The statute's impending expiration dooms the certiorari request.

In addition, Article 5 may be legislatively superseded. In response to the Eighth Circuit's opinion, the original supporters of Article 5 in the Minnesota Legislature recently proposed new legislation in an apparent attempt to remedy the numerous infirmities that plagued the original statute. On March 1, 2006, "[a] bill for an act relating to telecommunications; providing consumer protections for wireless customers; amending Minnesota Statutes 2004, section 325F.695" was introduced in the Minnesota House of Representatives. App 1a-4a (H.F. 2983, 84th Leg. Sess. (Minn. 2006)). On March 13, 2006, a companion bill was introduced in the Minnesota Senate. App. 5a-8a (S.F. 2988, 84th Leg. Sess. (Minn. 2006)). These bills, whatever their ultimate validity, both seek to eliminate the particular features of Article 5 that were at issue in the Eighth Circuit. Among other changes, the proposed legislation would strike out the 60-day advance notice and opt-in provisions. App. 3a (H.F. 2983, § 1, subdiv. 3); App. 7a (S.F. 2988, § 1, subdiv. 3).[7] If these bills are enacted into law, the resultant legislation will moot this case. *See, e.g., Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (holding that a "substantial amendment" of a challenged regulation mooted controversy over its validity); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam) ("[T]he recent amendatory action of the Colorado Legislature [to the challenged statute] has surely operated to render this case moot.").

Given that Article 5 will no longer exist in less than 15 months and that the Minnesota Legislature has already gone back to the drawing board in an effort to fix the legal problems

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7. Further, the new bills attempt to remedy the vagueness problems of Article 5. App. 2a (H.F. 2983, § 1, subdiv. 1(b) (d), (e)); App. 6a (S.F. 2988, § 1, subdiv. 1(b), (d), (e)).

associated with Article 5, any review of the decision below by this Court is both unwarranted and unnecessary.

B. Due to the Procedural Posture of This Case, a Decision by This Court Will Not Resolve the Validity of Article 5.

This is a flawed vehicle for review of any questions worthy of certiorari for yet another reason: Petitioner's success on the question whether Article 5 constitutes rate regulation preempted by Section 332(c)(3)(A) will not necessarily save the statute from invalidation.

This case arises out of a motion for preliminary relief, which was predicated not only on the ground of express preemption under Section 332(c)(3)(A) but also on conflict and implied preemption, as well as unconstitutional vagueness. Given its resolution of the preemption issue, the Court of Appeals found it unnecessary to reach the vagueness claim. Pet. App. 14a-15a. Moreover, Respondents initially filed suit on several additional grounds, including the Due Process Clause, the Contracts Clause, the Commerce Clause, and Section 1983, none of which were litigated in the proceedings that have brought the parties to this Court.

Thus, in the unlikely event Petitioner were to prevail in this Court on the merits of his claim under Section 332, his victory could be purely theoretical. Litigation over the validity of Article 5 (assuming the case is not mooted by the statue's expiration or amendment) would continue on the remaining grounds in the lower courts, which could result in the invalidation of Article 5 for reasons wholly independent of preemption.

The numerous vehicular flaws discussed above preclude any meaningful review of the questions presented by Petitioner, even if those questions themselves satisfied this Court's standards for the grant of certiorari.

III. In Any Event, the Court of Appeals Correctly Concluded that Article 5 Regulates Rates, Rendering the Entire Minnesota Statute Preempted by Federal Law.

Bared of its exaggerated rhetoric, Petitioner's argument amounts to a claim that the Eighth Circuit erred in finding that Article 5 was preempted by Section 332(c)(3)(A). In this regard, Petitioner focuses not so much on the Court of Appeals' interpretation of Section 332 but on its findings with respect to the meaning and operation of Article 5. But this Court does not sit to review mere error below. Moreover, the proper application of Section 332 to the particular state statute at issue, or the details of that statute's construction and operation, are not the types of questions that typically concern this Court. In any event, the Court of Appeals' entire analysis was correct.

A. The Court of Appeals Correctly Held That Article 5 by its Terms Regulates Rates in Violation of Section 332(c)(3)(A).

The Eighth Circuit correctly interpreted Article 5 when it concluded that Minnesota's attempt to regulate wireless rates under the guise of "consumer protection" is rate regulation prohibited by Section 332(c)(3)(A).

Section 332(c)(3)(A) of the Communications Act, entitled "State preemption," provides that "no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). As discussed above, the Eighth Circuit took a careful and cautious approach to the statute, thoroughly analyzing its text, purpose, legislative history, and relevant agency precedents. As a result of this analysis, the Court of Appeals, basing its interpretation on two FCC decisions, correctly found that the proscription against "any authority" of the States "to regulate . . . the

rates charged" by wireless service providers, 47 U.S.C. § 332(c)(3)(A), includes state attempts to "fix" or "freeze" rates for any period of time. Pet. App. 9a-10a.

The Court then applied this federal rule of law to the particular state action before it, Article 5. Article 5 flatly prohibits any change that "could result in an increase in the charge to the customer" or "[a] price increase," Art. 5, § 1, subdiv. 1(d), without the provision of 60-day advance notice of the change and unless and until the individual customer affirmatively opts in to the increase in writing, *id.* subdiv. 3. The statute further mandates that, for as long as opt-in remains outstanding, "the original contract terms shall apply." *Id.*

Based on its reading of Article 5's unmistakable terms and its obvious effect, the Eighth Circuit rightly concluded that, whatever the duration of the various types of freezes effectuated by the statute, it has a "clear and direct effect on rates." Pet. App. 12a. In particular, the Court reviewed subdivision 3 and determined that: (i) the 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) even accepting the State's argument that the 60-day period is not mandatory,[8] the opt-in mechanism still fixes rates, for the entire term of existing wireless service agreements, for those customers who decline to opt in; and (iii) even if some customers would agree to a price increase, contrary to all intuition,[9] the

8. The Court of Appeals noted that this position "strikes us as inconsistent with the plain meaning of the text of the statute," Pet. App. 9a, but assumed it *arguendo*.

9. The Court of Appeals observed that the proposition "that all consumers would willingly accept rate hikes when proposed, and thus 'opt in' before the expiration of the 60-day period" was "contrary to our experience with human nature." Pet. App. 10a. As Respondents argued below, it is difficult to imagine a scenario in which customers would take the time and effort to execute and transmit to a service provider an agreement in writing acceding to higher prices.

rate would be frozen until that assent was manifested. Pet. App. 9a-10a. Thus, the Court of Appeals did not just find that the statute freezes rates on Respondents' theory of Article 5, but went on to explain that the statute freezes rates even on Petitioner's theory of the statute and his counterintuitive assertions regarding consumer behavior.

In light of the foregoing, the Court of Appeals concluded that "[t]he statute thus requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts, which typically allow an adjustment of rates after reasonable notice of fewer than 60 days." Pet. App. 10a. Because "subdivision 3 effectively regulates rates," the Court of Appeals found it to be preempted by Section 332(c)(3)(A). Pet. App. 12a.

While Petitioner contests the correctness of these conclusions, his efforts are, as explained below, unavailing. Once the Eighth Circuit correctly concluded that Article 5 regulates wireless rates, the answer to the question of federal preemption was plain.

1. Petitioner Advances an Unduly Narrow Understanding of Rate Regulation.

Petitioner's contention that the Eighth Circuit erred in its understanding of the meaning of Section 332(c)(3)(A) fundamentally misapprehends the nature of rates and rate regulation. Petitioner's argument that Article 5 is not rate regulation under Section 332(c)(3)(A) because it does not require the filing of rates with a state regulator or impose an administrative review process, Pet. 25-27, is simply wrong. Petitioner reasons that, in 1993, Congress' understanding of rate regulation was limited to the state tariffing procedures on which the filed rate doctrine is based. Pet. 25 ("Importantly, it was well-established by 1993 that a rate regulated entity generally could charge only the rate on file with the relevant federal or

state agency."). He cites the FCC's 1995 rejection of Connecticut's request to continue its traditional regulation of wireless rates as confirmation of this limited understanding of rate regulation. Pet. 26.

This lacks merit. As a threshold matter, the FCC's 1995 rejection of a request to impose tariff requirements on wireless providers is not determinative of the scope of Congress' preemptive intent in 1993. In the Connecticut case, the FCC was not expounding on the breadth of Section 332(c)(3)(A) but reviewing a State's request to continue with one particular type of rate regulation, as Petitioner himself acknowledged. *See* Pet. 26. If Congress intended only to eliminate state wireless tariff requirements, it could have been far more precise in drafting its preemption provision and said so; instead, it expressly foreclosed the exercise of "*any* [state] authority" to regulate rates. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

Petitioner's restrictive definition of rate regulation conflicts with years of judicial and agency determinations that various types of state action, not just tariff requirements, run afoul of Section 332(c)(3)(A). *See, e.g., Truth-in-Billing and Billing Format*, 20 FCC Rcd. at 6463 (¶ 30) n.84 (noting that "the terms 'state regulation' and 'state regulatory action' have broad application in the context of section 332"); *Petition of Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd. 19898, 19906-07 (¶ 20) (1999) (finding that state court litigation challenging carrier practices of "rounding up" to the nearest minute and charging for incoming calls were prohibited rate regulation); *Wireless Consumers Alliance*, 15 FCC Rcd. at 17027 (¶ 12) (noting that "judicial action can constitute state regulatory action for purposes of Section 332" (citing decisions of this Court)); *see also Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 986 (7th Cir. 2000) (concluding state complaints could be preempted); *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (accepting premise that state judicial action can constitute

impermissible rate regulation); *Gilmore v. Sw. Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) (deeming state law claim based on unjust enrichment preempted under Section 332(c)(3)(A)). It is thus clear that state rate regulation is not limited to the traditional tariff review process at state public utility commissions; state "oversight" of rates can come in many forms other than the requirement that carriers "file their rates with the State." Pet. 25, 26. Indeed, this much was accepted without objection below, and Petitioner makes this argument here for the first time.

Petitioner also emphasizes that Congress stated that it was not preempting state regulation of "the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). But Congress did preempt rate regulation, and, as we have shown, a rate freeze is rate regulation. By declining to preempt *other* terms and conditions of wireless service, Congress did not authorize States to freeze rates.

Petitioner further argues that the Eighth Circuit erred in failing expressly to carve out the State's authority to regulate contract term length, which Petitioner argues is distinct from rate regulation and therefore not preempted. Pet. 22-24. This argument need not long detain the Court, and is certainly no basis for certiorari. *First*, for the Court of Appeals to have done what Petitioner urges would have required it to "blue pencil" a portion of a definitional section that it already found could not independently stand in light of the infirmities of subdivision 3.[10] *Second*, if Petitioner thought the Court of Appeals neglected

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10. Petitioner cloaks an allegation of error with respect to severability in the mantle of an alleged misapplication of federal law. To preserve the contract extension portion of the statute, the Eighth Circuit would have had to selectively edit subdivision 1's definition of "substantive change" as follows:

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to address the term extension piece of subdivision 3, he could have sought panel rehearing on this issue. *See* Fed. R. App. P. 40 (providing for petitions for panel rehearing with respect to "point[s] of law or fact that the petitioner believes the court has overlooked or misapprehended"); *see also* 8th Cir. R. 40A. But he did not. Petitioner should not ask this Court to exercise its certiorari jurisdiction to engage in this sort of niggling review of the opinion below.

In any event, this argument is foreclosed on the merits by this Court's recognition that "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998). The length of a contract term is intimately connected to the price charged, and thus state regulation of contract term length, which would obviously affect the price charged, is rate regulation.

2. Petitioner's Claim of Error Is Predicated on Mere Disagreement with the Court of Appeals over the Meaning and Operation of Article 5.

Because Article 5's preemption was a foregone conclusion once the Eighth Circuit determined the statute effectively

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(Cont'd)

> Subd. 1(d). "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that ~~could result in an increase in the charge to the customer under that contract or that~~ could result in an extension of the term of that contract.

In light of the complete invalidation of subdivision 3, such an exercise would have required the Court of Appeals to cobble together its own version of a wireless consumer protection statute, usurping the Minnesota Legislature's role. As explained above, two bills amending Article 5 in order to try and cure its legal defects already have been introduced in the Minnesota Legislature.

regulated wireless rates, Petitioner's assertion of error is at bottom nothing more than a request that this Court review and correct the Eighth Circuit's alleged misinterpretation of the language and workings of Article 5. Error correction is not a task worthy of this Court's certiorari jurisdiction. Furthermore, the claim of error lacks merit. As the Court of Appeals concluded, the inescapable textual mandate and practical effect of Article 5's 60-day notice provision and opt-in requirement is to restrict wireless carriers' ability to increase prices pursuant to the express provisions of customer service agreements.

As he unsuccessfully argued below, Petitioner once again asserts that the 60-day notice requirement does not freeze rates for that period of time. To do so he must deny that "60 days," Art. 5, § 1, subdiv. 3, means 60 days. He contends that the "Act simply requires notice '60 days before the change is proposed to take effect,' and provides that the change may take effect if the customer 'opts in' before the 'proposed effective date.'" Pet. 27 (quoting Art. 5, § 1, subdiv. 3). But nothing in Article 5 provides that the change may take effect, even where the customer agrees to it, until after the 60 days has run.

As the Eighth Circuit explained, this argument is "inconsistent with the plain meaning of the text of the statute." Pet. App. 9a. Under the statute, the proposed effective date is the sole benchmark for computing the date that notice must be given, and accurately calculating the required notice necessarily depends upon the effective date being fixed in time. The statute nowhere suggests that the effective date can be moved up in time if the customer assents. In the words of the Court of Appeals, "[a] proposed change thus must include a proposed effective date, and modification of the 'effective date' is not contemplated by the statute." Pet. App. 10a.

Moreover, the Eighth Circuit found that subdivision 3 freezes rates even assuming that the 60-day period is merely permissive:

> [E]ven accepting the State's interpretation, under which rates may be changed as soon as a customer manifests assent, the statute still fixes rates for at least some customers to some degree. If even one customer declines to "opt in" to a provider's rate increase, then the proposed rate for that customer's service would be fixed for the term of the existing contract . . . .

Pet. App. 10a. The Eighth Circuit further bullet-proofed its determination that Article 5 regulates rates by finding that, in the unlikely scenario that a customer agrees to a rate change before the 60 days has run, "subdivision 3 indisputably freezes rates . . . at least until the consumer manifests acceptance." Pet. App. 10a. Petitioner fails even to address these two alternative findings of the Court of Appeals.

For all these reasons, the Eighth Circuit correctly concluded that Article 5, given its language and practical effect, regulates rates in violation of Section 332. The Petition provides no reason for this Court to second-guess that well-founded conclusion.

3. Article 5 Is Not Saved from Preemption by Petitioner's Unadorned Assertion That It Is a "Consumer Protection" Statute.

Repeatedly calling Article 5 a "consumer protection" measure, *see* Pet. 9-14, does not bring it within the scope of "other terms and conditions" under Section 332(c)(3)(A). If a state law regulates wireless rates, it is preempted by Section 332, regardless of the label affixed to it. As the Eighth Circuit aptly observed,

> [a]ny measure that benefits consumers, including legislation that restricts rate increases, can be said

> in some sense to serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A).

Pet. App. 10a-11a.

Nor does Article 5 simply codify contract law. Rather, subdivision 3 "goes beyond traditional requirements of contract law, and thus falls outside the scope of the 'neutral application of state contractual or consumer fraud laws,' which the FCC has said is permissible state regulation of wireless providers." Pet. App. 11a (quoting *Wireless Consumers Alliance*, 15 FCC Rcd. at 17025-26 (¶ 8)). Minnesota does not seek the power to enforce contracts as written, because the contracts as written contain valid change-in-terms provisions that expressly permit the conduct that Petitioner alleges is abusive. *See* Pet. App. 11a; *supra* pp. 5-6 & n.1. Instead, Minnesota seeks legislatively to change basic features of the standard contracts used by the wireless industry.

B. The Eighth Circuit Properly Applied Established Principles of Minnesota Law to Conclude That Severance Was Inappropriate.

Petitioner also asks this Court to exercise its certiorari jurisdiction in order that it, rather than the Eighth Circuit, apply settled Minnesota severance law to Article 5. The severability of Article 5, however, is a question of pure state law. Not only is such an issue inappropriate for review on certiorari, but this Court, if it took up the severance question, would only reach the same conclusion as the Court of Appeals – namely, that subdivision 3 of Article 5 is not severable from the other provisions because they are "connected with and dependent upon subdivision 3." Pet. App. 13a.

In reaching this conclusion, the Court of Appeals conducted a thorough review of Minnesota's severance statute, Minnesota case law, and the legislative history of Article 5. That legislative history revealed, among other things, that subdivision 3 was "the motivating force behind" the entire statute. Pet. App. 13a. Petitioner conclusorily asserts that this severability analysis was in error because other subdivisions "stand on their own," Pet. 29, but he cites no controlling case law or informative legislative history to contradict the lower court's analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HELGI C. WALKER
Counsel of Record
MEGAN L. BROWN
WILEY REIN & FIELDING LLP
1776 K STREET, N.W.
WASHINGTON, DC 20006
(202) 719-7000

Counsel for Cellco Partnership, Verizon Wireless LLC, and Duluth MSA Limited Partnership

SEAMUS C. DUFFY
CHRISTOPHER M. ARFAA
DRINKER BIDDLE & REATH LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for Cingular Wireless PCS, successor to AT&T Wireless Services of Minnesota, Inc.

MARK J. AYOTTE
ANDREW M. CARLSON
BRIGGS & MORGAN, P.A.
2200 IDS Center
80 S. Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Counsel for Midwest Wireless Holdings L.L.C., Midwest Wireless Communications L.L.C., American Cellular Corporation, and Rural Cellular Corporation d/b/a Unicel

CHRISTOPHER J. WRIGHT
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1325

Counsel for Sprint Spectrum L.P.

ROBERT D. KAPLAN
DANIEL B. RAPPORT
FRIEDMAN, KAPLAN, SEILER
& ADELMAN LLP
1633 Broadway
New York, NY 10019
(212) 833-1100

Counsel for VoiceStream
Minneapolis, Inc.
and T-Mobile USA, Inc.

APPENDIX

APPENDIX A — MINNESOTA HOUSE OF REPRESENTATIVES, H.F. No. 2983, as introduced - 84th Legislative Session (2005-2006), Posted on Feb. 28, 2006

MINNESOTA HOUSE OF REPRESENTATIVES

H.F. No. 2983, as introduced -
84th Legislative Session (2005-2006)
Posted on Feb. 28, 2006
[*Available at: http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H2983.0.html&session=ls84&print=1*]

A bill for an act relating to telecommunications; providing consumer protections for wireless customers; amending Minnesota Statutes 2004, section 325F.695.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2004, section 325F.695, is amended to read:

325F.695 CONSUMER PROTECTIONS FOR WIRELESS CUSTOMERS.

Subdivision 1. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

Appendix A

(b) "Customer" means a party to a valid current contract with a provider to receive wireless telecommunication services.

(c) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

~~(c)~~ (d) "Provider" means a provider of wireless telecommunications services.

~~(d)~~ (e) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that ~~could result~~ results in an increase in the charge to the customer under that contract or that ~~could result in an extension of~~ lengthens the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in ~~taxes or fees~~ a state or federal tax, fee, or surcharge, which the state or federal government authorizes or requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. **Copy of contract.** A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the effective date of the contract ~~is entered into~~. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Appendix A

Subd. 3. **~~Provider-initiated~~ Notice of substantive change.** A provider must notify the customer in writing in advance of any ~~proposed~~ substantive change proposed by the provider in ~~the~~ an existing contract between the provider and the customer. ~~60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.~~ The notification must be sent separately from other mailings and the envelope must be labeled "NOTICE OF PROPOSED CHANGE IN CONTRACT TERMS." The font of the notification must be of sufficient size to be clearly legible and must contain clear and unambiguous language separately detailing each substantive change proposed by the provider and its effective date.

Subd. 4. **~~Customer initiated change~~ Customer may opt out.** ~~If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.~~ A customer who has received a provider's notice required under subdivision 3 may choose

to opt out of and terminate a contract without penalty, provided that the customer notifies the provider in writing of the decision to terminate the contract within 60 days of the effective date of the substantive change contained in the provider's notice. A customer who does not send a provider timely written notice of a decision to opt out of and terminate the contract is considered to have agreed to the proposed substantive change and the contract is considered modified.

~~Subd. 5. Expiration. This section expires August 1, 2007.~~

EFFECTIVE DATE. This section is effective July 1, 2006, and applies to contracts for wireless service entered into on or after May 1, 2006.

APPENDIX B — MINNESOTA HOUSE OF REPRESENTATIVES, S.F. No. 2988, as introduced - 84th Legislative Session (2005-2006), Posted on Mar. 09, 2006

MINNESOTA HOUSE OF REPRESENTATIVES

S.F. No. 2988, as introduced -
84th Legislative Session (2005-2006)
Posted on Mar. 09, 2006
[*Available at: http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2988.0.html&session=ls84*]

A bill for an act relating to telecommunications; providing consumer protections for wireless customers; amending Minnesota Statutes 2004, section 325F.695.

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Appendix B

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(c) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

~~(c)~~ (d) "Provider" means a provider of wireless telecommunications services.

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Appendix B

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to opt out of and terminate a contract without penalty, provided that the customer notifies the provider in writing of the decision to terminate the contract within 60 days of the effective date of the substantive change contained in the provider's notice. A customer who does not send a provider timely written notice of a decision to opt out of and terminate the contract is considered to have agreed to the proposed substantive change and the contract is considered modified.

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EFFECTIVE DATE. This section is effective July 1, 2006, and applies to contracts for wireless service entered into on or after May 1, 2006.